

EXHIBIT H
TO THE DECLARATION OF JOSEPH V. WILLEY

**OFF. SPECIAL EDUC., N.Y. DEP'T EDUC.,
SUPPLEMENT #3 – PROVISION OF SERVICES TO
STUDENTS WITH DISABILITIES DURING
STATEWIDE SCHOOL CLOSURES DUE TO NOVEL
CORONAVIRUS (COVID-19) OUTBREAK IN NEW
YORK STATE (June 20, 2020)**

**NEW YORK STATE EDUCATION DEPARTMENT
OFFICE OF SPECIAL EDUCATION**

**SUPPLEMENT #3 - PROVISION OF SERVICES TO STUDENTS WITH DISABILITIES
DURING STATEWIDE SCHOOL CLOSURES DUE TO
NOVEL CORONAVIRUS (COVID-19) OUTBREAK IN NEW YORK STATE**

Questions and Answers June 20, 2020

The following is a continuation and supplement to the questions and answers contained in the [March 27, 2020 guidance \(#1-21\)](#), [April 27, 2020 guidance \(#22-38\)](#), and [June 20, 2020 guidance \(#39-51\)](#) on the provision of services to students with disabilities during the COVID-19 outbreak in New York State.

On June 5, 2020 the Governor issued [Executive Order 202.37](#) that included the following language, “[n]otwithstanding any prior Executive Order to the contrary, special education services and instruction required under Federal, state or local laws, rules, or regulations, may be provided in person for the summer term in school districts. Any district providing such services in person must follow State and Federal guidance.” Further guidance was issued on June 9, 2020 by the New York State (NYS) Department of Health (DOH) titled [Interim Advisory for In-Person Special Education Services and Instruction During the COVID-19 Public Health Emergency](#) and [Interim Guidance for Child Care and Day Camp Programs During the COVID-19 Public Health Emergency](#).

The New York State Education Department (NYSED), has received numerous questions from the field including parents, school districts, Board of Cooperative Education Services (BOCES), and approved private programs and providers serving school-age and preschool students with disabilities. The information below represents NYSED’s guidance in response to Executive Order 202.37 and the corresponding DOH documents.

52. The Executive Order (EO) 202.37 was issued for the period of June 5, 2020 to July 5, 2020 but summer programs do not begin until after July 1st. How does the EO period impact July and August special education services?

EO 202.37 is applicable to the 2020 extended school year (ESY) special education programs and services which, pursuant to NYS Education Law section 4408, are approved to operate during July and August for six weeks and funded for 30 days of service. It is anticipated that the EO will be extended to apply to the entire duration of the 2020 ESY program.

53. The EO identifies special education services and instruction provided by school districts while the DOH guidance is directed at school districts and approved private “independent schools,” both school-age and preschool (e.g., 853 schools, 4201 schools, 4410 schools). What specific programs and services are authorized by the EO?

EO 202.37 is applicable to approved ESY programs and services operated by authorized entities. Approved ESY programs and services include school-age special class, integrated co-teaching, related services only, specialized instruction only, specialized instruction with related services, home/hospital instruction, preschool special class, special class in an integrated setting, special education itinerant services, and preschool related services only.

Authorized entities (hereinafter referred to as “providers”) include those entities that have been approved by NYSED to operate one or more ESY programs including school districts, BOCES, nonpublic schools with an approved special education program (853 Schools), State-Supported Schools (4201), State-Operated Schools, approved preschool special education programs (4410), and related service providers authorized pursuant to NYS Education Law section 4410, and education programs operated pursuant to NYS Education Law section 112.

54. Does EO 202.37 apply to transportation?

NYSED interprets EO 202.37 to authorize transportation to ESY approved school-age and preschool programs. NYSED has requested further guidance from DOH pertaining to additional health and safety requirements applicable to school transportation and in-person evaluations. Until further guidance supersedes, county and school district school transportation should follow the transportation standards contained in [Interim Guidance for Child Care and Day Camp Programs During the COVID-19 Public Health Emergency](#).

55. Does EO 202.37 apply to initial evaluations and reevaluations?

NYSED interprets EO 202.37 to authorize in-person preschool and school-age initial evaluations and reevaluations for all children, not solely those receiving ESY programs and services.

56. Is EO 202.37 permissive or does it require the provision of in-person special education services and instruction? What is meant by the DOH guidance stating, “students receiving special education services and instruction are entitled to the opportunity to receive in-person instruction”? Are in-person special education services and instruction required for the provision of free appropriate public education (FAPE)?

EO 202.37 is permissive. It authorizes in-person ESY programs and/or services if the ESY provider is able to implement the health and safety requirements outlined in the DOH guidance: [Interim Advisory for In-Person Special Education Services and Instruction During the COVID-19 Public Health Emergency](#). A school district may request a student receive special education instruction and/or related services in-person. Upon a request from a school district, each ESY provider is responsible for making its own determination for whether it is able to effectively comply with the DOH guidance and offer in-person programs and/or services for July/August 2020.

For ESY 2020, students with disabilities are entitled to receive their individualized education program (IEP) recommended ESY program and services, to the greatest extent possible. ESY programs and services may be provided in-person or through remote learning/delivery of related services. ESY programs and services are required to continue remotely in the event a provider has determined it is not able to offer in-person programs or services in accordance with the applicable DOH guidance.

For ESY 2020, the offer of FAPE may be made by providing ESY programs and/or services either in-person or remotely (or a combination of both). The decision as to whether a student receives in-person versus remote services is solely based on the extent to which in-person services may be offered by the student's provider in accordance with the DOH health and safety requirements.

57. Are 2020 ESY providers allowed to offer some but not all programs and services in-person? For example, can instruction be provided remotely while related services be provided in-person?

Providers have flexibility to offer in-person programs and services for those services where DOH health and safety guidance may be implemented with fidelity and continue remotely for all other programs and services. The assessment of what 2020 ESY programs and services may be provided in-person may be on a case-by-case basis.

58. If a provider offers in-person services for 2020 ESY, can they do so on a part-time basis? For example, for a special class program can in-person instruction be provided on a half-day basis, or for fewer than five days per week, supplemented by remote instruction to account for the missed time? For itinerant services, can some sessions be delivered in-person and others remotely?

For 2020 ESY programs and services, providers may offer in-person programs and services, in accordance with applicable DOH health and safety guidance, remote services, or a combination of both. Where programs are not able to meet the existing requirements for length of school-day, five days a week, or 30 days of session through in-person programs and services, such programs and services may be combined with remote learning in order to implement the student's IEP to the greatest extent possible. Itinerant services may also be delivered to a student where some services are delivered in-person and others remotely.

59. Does flexibility to implement IEP programs and services to the greatest extent possible continue to be in effect for the 2020 ESY period? If so, is the flexibility equally applicable to in-person and remote service delivery?

Yes, the same flexibility with respect to IEP implementation for delivery of services during the COVID-19 outbreak continues to apply to the 2020 ESY programs and services delivered in-person, remotely, or a combination of both (e.g., flexibility with

respect to the mode or manner; group or individual sessions; specific group size for related services, frequency, duration and location of related services, special class size ratio, minimum length of school day instruction etc.). For 2020 ESY, school districts must ensure that, to the greatest extent possible, each student with a disability is provided the special education and related services identified in the student's IEP recognizing that during the COVID-19 outbreak, providers may not be able to deliver all services in the mode or manner they are typically provided. The school district would not be required to amend students' IEPs.

Making every effort possible now to provide required special education programs and services is the most effective way to mitigate the need to provide compensatory services in the future. It is also very important for school personnel and parents to work collaboratively and creatively to ensure there is an understanding of the efforts to provide services consistent with the recommendations on the IEP and monitor student progress. Providers must communicate with parents in their preferred language or mode of communication and should document their outreach efforts. Documentation must be maintained on the 2020 ESY instruction and services that were offered and/or provided to each student (in-person, remotely, or a combination of both) so that these activities may be communicated to the Committee on Special Education/Committee Preschool Special Education for consideration when making an individualized determination as to whether and to what extent compensatory services may be needed when schools reopen.

60. What is the maximum group size for school-age special class and integrated co-teaching programs and preschool special class and special class in an integrated setting program? Does an IEP amendment need to occur if the group size will differ from the IEP class size ratio of 12 or more students?

In accordance with the DOH guidance, [Interim Advisory for In-Person Special Education Services and Instruction During the COVID-19 Public Health Emergency](#), in-person 2020 ESY special class, integrated co-teaching, and special class in an integrated setting programs may be provided to students with disabilities in a group size not to exceed 10 students. Teachers, supplementary school personnel (i.e., teaching assistants and/or teacher aides), 1:1 aides, and related service providers do not count toward the maximum group size of 10 students. An IEP class size is a maximum student to staff ratio; therefore, an actual group size of 10 students would not be in violation of an IEP that recommends a special class size ratio of 12 or more students.

61. If a parent is uncomfortable with their child receiving in-person 2020 ESY programs and services, are programs and services required to be provided remotely?

Yes, for 2020 ESY, parents may decide not to have their children receive programs and services in-person. In the event a parent declines in-person services, students would continue to be entitled to receive 2020 ESY programs and services on a remote

basis. Committees on Special Education/Committees on Preschool Special Education must maintain documentation regarding its communication with the parent regarding the offer of in-person programs and services and the parent's decision to decline the in-person services that are offered. Parents may decline some in-person services but not others if multiple in-person services are offered. For example, a parent may decline in-person special education itinerant services but elect to receive in-person related services.

62. Which DOH guidance document is applicable to approved preschool special class and special class in an integrated setting programs licensed by the Office of Children and Family Services (OCFS) or New York City Department of Health and Mental Hygiene (DOHMH)?

Both DOH guidance documents, [Interim Advisory for In-Person Special Education Services and Instruction During the COVID-19 Public Health Emergency](#) and [Interim Guidance for Child Care and Day Camp Programs During the COVID-19 Public Health Emergency](#), are applicable to those preschool special education programs that are also licensed by OCFS or NYC DOHMH. The DOH guidance documents are substantially similar, however the stricter standard is controlling to the extent conflicts arise.

63. Is transportation required in order for 2020 ESY programs and services to be offered in-person? Is there any health and safety guidance applicable to transportation?

Yes, for any 2020 ESY program and services offered in-person, counties and school districts must provide transportation, which, for preschool special education may include parents transporting their child at public expense. NYSED has requested further guidance on the applicable health and safety requirements for school transportation. Until further guidance supersedes, counties and school district school transportation should apply the transportation standards contained in [Interim Guidance for Child Care and Day Camp Programs During the COVID-19 Public Health Emergency](#).

64. The DOH guidance requires providers to establish and maintain communication with parents/guardians and local health authorities about the scale and scope of in-person special education services and instruction being offered within the school district and/or school. Are there any timelines required for informing parents, Committees on Special Education/Committees on Preschool Special Education, the County (for preschool special education transportation), or other location where services are to be provided (for itinerant services)?

It is recommended that providers notify their intent to provide in-person programs and services as soon as possible. Advanced notice will allow parents time to consider whether to accept or decline in-person 2020 ESY programs and services and provide more time for transportation arrangements.

65. Is there any flexibility regarding the July and August calendar? Can providers amend their start date to a later date to allow for more planning time? Can providers extend the calendar beyond six weeks, understanding that only 30 days of programs and services will be funded?

Yes. 2020 ESY providers may amend their start date provided that the amended calendar reflects at least six weeks funded at 30 days of programs and services. Prior approval from NYSED is not required but a provider would be required to update the new start and end dates in the System to Track and Account for Children (STAC).

66. What are the reimbursement rules for 2020 ESY programs and/or services? Are there different rates for in-person versus remote programs and services?

Reimbursement rates are the same regardless of whether 2020 ESY programs and services are delivered in-person, remotely, or a combination of both. For purposes of 2020 ESY programs and services, days where programs and services are provided remotely count toward the 30 days of service requirement.

Programs operating ESY special class programs (both school-age and preschool), integrated co-teaching programs or preschool special class in an integrated setting programs should continue to bill their authorized tuition rate or per pupil charge, as applicable, for enrolled students for July and August 2020. When available, 2-month rates for the 2020-21 school year will be published on the [NYSED Rate Setting Unit's Rates and Methodology webpage](#).

Reimbursement for school-age related services only, specialized instruction only, specialized instruction with related services, home/hospital instruction, and preschool SEIS and related services only are fee for services and programs and providers must ensure they are only billing for the services actually delivered. When available, authorized 2020-21 rates for these programs will be published on the [NYSED Rate Setting Rates and Methodology webpage](#).

67. If a student is not able to attend in-person due to failure to meet the health screening criteria, are remote programs and services required until the student is able to attend in-person?

Yes, providers must offer remote programs and services within a reasonable amount of time if students are not able to attend in-person programs and services.

68. If the in-person services must be suspended due to a health or safety concern, as directed by the DOH guidance, are remote programs and services required until students are able to attend in-person?

Yes, the provider must offer remote programs and services within a reasonable amount of time if students are not able to attend in-person programs and services.

69. Who is responsible for the provision of 2020 ESY programs/services in the event the private provider or BOCES is not able to offer 2020 ESY?

If a private provider or BOCES is not able to operate 2020 ESY programs/services either in-person, remotely, or a combination of both, tuition should not be charged for those students. The school district is ultimately responsible for ensuring the provision of FAPE to its resident students with disabilities (see Questions #30 and #31 in [Supplement #1 - Provision of Services to Students with Disabilities During Statewide School Closures Due to Novel Coronavirus \(COVID-19\) Outbreak in New York State – Additional Questions and Answers \(April 27, 2020\)](#) which is still applicable for 2020 ESY programs and services). As indicated in Question #1 of the March 27, 2020 guidance and Question #27 of the April 27, 2020 guidance, school districts must ensure that, to the greatest extent possible, each student with a disability is provided the special education and related services identified in the student's IEP but that during this emergency, schools may not be able to provide all services in the same manner they are typically provided. Making every effort possible now to provide required special education programs and services is the most effective way to mitigate the need to provide compensatory services in the future.

70. Do any of the in-person, remote, or combination delivery of services require a change to the provider's approval letter?

No. Changes to the approval letter authorizing 2020 ESY are not required to reflect the mode or manner of instructional/related service delivery as long as the provider is approved to offer the ESY or service.